Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT NO 22-346-1993
ABDUL MALIK ISHAK J
16 AUGUST 1995

Damages (Personal Injury or Death) *— General damages — Assessment — Factors — Fall in value of money*

Damages (Personal Injury or Death) *— Special damages — Loss of earnings — Deduction of personal expenses from income — Personal expenses not admitted or proved — Whether deduction should be made*

Damages (Personal Injury or Death) *— Special damages — Future medical expenses — Pleaded under special damages — Not absorbed in general damages*

Damages (Personal Injury or Death) *— Special damages — Future nursing care — Fair and adequate amount — Wife may not be around all the time to look after plaintiff*

Tort *— Negligence — Breach of statutory duty — Absolute obligation — Causal relationship between breach and accident — Not necessary to prove manner of occurrence of accident — Not necessary to prove lack of care or diligence — Electricity Supply Regulations 1990 regs 22(12)(a), (16)(a), (24)(a) & 32(5)*

Tort *— Negligence — Duty of care — Electricity supplier — Electrical engineer — Duty owed to workmen — Safety — Reasonably foreseeable acts or omissions likely to cause injury to persons so affected*

The plaintiff and another person suffered severe burn injuries due to an explosion at an electric sub-station at Taman Universiti, Skudai, Johore. The plaintiff was at the material time an employee of a sub-contractor of the second defendant providing service and repair to the sub-station. The plaintiff claimed damages for personal injury against the first defendant, the engineer in charge of the sub-station, and the second defendant on the alternate grounds of breach of statutory duty and/or negligence at common law.

Held, allowing the plaintiff's claim:

(1) The Electricity Supply Regulations 1990 applied in the present case.

(2) The defendants were in breach of the statutory duty imposed under regs 22(12)(a), (16)(a), (24)(a) and 32(5) of the Electricity Supply Regulations 1990. The defendants' statutory duty were absolute and as such became actionable once non-performance had been proved, without having to prove any lack of care or diligence on the either one of them. The

plaintiff's claim would succeed so long as the defendants were in breach of the Electricity Supply Regulations 1990 and the accident would not have occurred but for the breach, even though the plaintiff had not given an acceptable version of how the accident had occurred.

(3) The defendants were negligent in not ensuring that the sub-station was safe. The first defendant as the engineer and authorized person owed to the plaintiff a duty of care to take reasonable care to avoid acts or omissions which he could reasonably foresee would likely injure a person so closely and directly affected by his acts or omissions. The second defendant as the undertaker of electricity and the owner of the sub-station owed a similar duty of care to take reasonable care.

(4) The defendants were wholly liable. There was no sufficient evidence to show a lack of reasonable care by the plaintiff for his own safety.

(5) The plaintiff was entitled as an aggrieved party to file the present suit. He was not an insured person within the meaning of s 31 of the Employees' Social Security Act 1969 on the day of the accident.

(6) A fall in the value of money must be taken into account in the use of comparables, so that the award which was eventually given would be reflective of the current value of money. Such a factor was within the expectation of the tortfeasor and would not be bad for remoteness.

(7) A deduction from the plaintiff's earnings for maintenance could only be made if the amount was either admitted by the plaintiff or proved by the defendant.

(8) Future medical expenses, which was pleaded as special damages and proved, was awarded and not absorbed into general damages.

(9) Future nursing care was awarded on the basis that the plaintiff's wife may not be able to provide care to the plaintiff at all times.

[Bahasa Malaysia summary

Plaintif dan seorang yang lain telah mengalami kecederaan kebakaran yang teruk akibat satu letupan di sebuah pencawang elektrik di Taman Universiti, Skudai, Johor. Plaintif pada masa yang berkenaan adalah seorang pekerja satu kontraktor kecil defendan kedua yang memberikan perkhidmatan dan menjalankan kerja membaiki di pencawang itu. Plaintif menuntut ganti rugi untuk kecederaan diri terhadap defendan pertama, jurutera yang mengawal pencawang itu, dan defendan kedua atas alasan alternatif keingkaran tugas statutori dan/atau kecuaian di sisi common law.

Diputuskan, membenarkan tuntutan plaintif itu: A

(1) Peraturan-Peraturan Pembekalan Elektrik 1990 ('Peraturan-Peraturan itu') terpakai di dalam kes ini.

(2) Defendan-defendan telah mengingkari tugas statutori yang diletakkan di bawah peraturan 22(12)(a), (16)(a), (24)(a) dan 32(5) Peraturan-Peraturan itu. Tugas statutori defendan-defendan adalah mutlak dan oleh itu tindakan boleh diambil terhadap mereka sebaik sahaja seseorang boleh membuktikan bahawa tugas itu tidak dijalankan, tanpa keperluan membuktikan sebarang kekurangan bercermat atau ketekunan pada belah mana-mana daripada mereka. Tuntutan mereka akan berjaya asalkan defendan-defendan mengingkari Peraturan-Peraturan itu dan kemalangan itu tidak mungkin berlaku jika tidak kerana keingkaran itu, biarpun plaintif tidak memberi versi yang boleh diterima tentang bagaimana kemalangan itu telah berlaku. B C D

(3) Defendan-defendan cuai apabila mereka tidak menentukan bahawa pecawang itu adalah selamat. Defendan pertama sebagai jurutera dan orang yang diberi kuasa berhutang kepada plaintif satu tugas bercermat untuk mengambil langkah yang munasabah untuk mengelakkan tindakan atau peninggalan yang boleh secara munasabah dijangkanya akan mungkin sekali mencederakan seorang yang begitu rapat dan akan menerima akibat tindakan atau peninggalannya. E

(4) Defendan-defendan bertanggungjawab sepenuhnya. Tidak ada keterangan yang mencukupi untuk menunjukkan kekurangan ketelitian yang munasabah oleh plaintif akan keselamatan dirinya. F

(5) Plaintif berhak sebagai satu pihak yang terkilan untuk memfailkan tindakan ini. Beliau bukan seorang yang diinsurankan mengikut makna s 31 Akta Keselamatan Sosial Pekerja 1969 pada hari kemalangan itu. G

(6) Kejatuhan di dalam nilai wang mesti diambil kira dalam menggunakan perbandingan supaya award yang akhirnya diberikan akan mencerminkan nilai wang semasa. Faktor sedemikian adalah dalam jangkaan pelaku tort dan tidak akan dibatalkan kerana berada di luar dugaan. H

(7) Satu tolakan daripada pendapatan plaintif untuk jumlah yang digunakan bagi dirinya sendiri hanya boleh dilakukan jika jumlah itu sama ada diakui oleh plaintif atau dibuktikan oleh defendan.

(8) Perbelanjaan perubatan masa depan, yang telah dijadikan pliding sebagai gati rugi khas dan dibuktikan, dibenarkan dan tidak diserap masuk ke dalam ganti rugi am. I

(9) Perbelanjaan untuk bantuan kejururawatan di masa depan diaward atas alasan isteri plaintif mungkin tidak dapat memberikan jagaan kepada plaintif pada semua masa.]

Notes

For cases on damages for personal injuries, see 6 *Mallal's Digest* (4th Ed) paras 328–567; [1992] *Mallal's Digest* 860–870; [1993] *Mallal's Digest* 711–715; [1994] *Mallal's Digest* 1199–1211; [1995] *Mallal's Digest* 867–879.

For cases on breach of statutory duty, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 417–418.

For cases on electricity supplier's duty of care, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) para 496.

Cases referred to

Allen v Aeroplane & Motor Aluminium Castings Ltd [1965] 1 WLR 1244; [1965] 3 All ER 377 (folld)

Ang Chwee Keong v R [1955] MLJ 36 (refd)

Boynton v Ancholme Drainage & Navigation Commissioners [1921] 2 KB 213 (refd)

Buckland v Guildford Gas Light & Coke Co [1949] 1 KB 410; [1948] 2 All ER 1086 (folld)

Buxton v North Eastern Railway (1868) LR 3 QB 549 (refd)

Chang Chong Foo & Anor v Shivanathan [1992] 2 MLJ 473 (refd)

Chin Sen Wah v PP [1958] MLJ 154 (refd)

Cooper v Railway Executive [1953] 1 WLR 223; [1953] 1 All ER 477 (refd)

Croke (a minor) & Anor v Wiseman & Ors [1982] 1 WLR 71; [1981] 3 All ER 852 (folld)

Cunard & Anor v Antifyre Ltd [1953] 1 KB 551; [1932] All ER Rep 558 (folld)

Dato Mokhtar bin Hashim v PP [1983] 2 MLJ 233 (refd)

Dixon v Great Western Railway [1897] 1 QB 300 (refd)

Foong Gun Mooi v Lim Yeok Soon [1978] 1 MLJ 218 (refd)

Lim Thong Eng v Sungei Choh Rubber Co Ltd [1962] MLJ 15 (folld)

Lochgelly Iron & Coal Co Ltd v M'Mullan [1934] AC 1 (refd)

London Graving Dock Co Ltd v Horton [1951] AC 736; [1951] 2 All ER 1 (refd)

London Passenger Transport Board v Upson [1949] AC 155; [1949] 1 All ER 60 (distd)

Makin v London North Eastern Railway [1943] KB 467 (refd)

Marappan v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 (folld)

Mohamed Husin v Shum Yip Leong Rubber Works Ltd [1972] 1 MLJ 17 (refd)

PP v Lee Ee Tong [1953] MLJ 244 (refd)

Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor [1988] 1 MLJ 19 (refd)
Phuah Jee Suan v Nila Vasu Pillai [1973] 1 MLJ 186 (folld)
Ramakrishnan v Lembaga Letrik Negara, Malaysia [1981] 2 MLJ 347 (refd)
Seng Chong Metal Works Ltd v Lew Fa [1966] 2 MLJ 63 (refd)
Shamsudin v Yap Choh Teh & Anor [1969] 1 MLJ 26 (refd)
Sim Ah Seng v R [1951] MLJ 150 (refd)
Smith v Cammell, Laird & Co Ltd [1940] AC 242 (folld)
Sundharan a/l Ramasamy & Anor v Loo Soon Mook @ Loo Koon Lay & Anor [1994] 3 CLJ 385 (refd)
Uddin v Associated Portland Cement Manufacturers Ltd [1965] 2 QB 582; [1965] 2 WLR 1183; [1965] 2 All ER 213 (refd)
Vyner v Waldenberg Brothers Ltd [1946] 1 KB 50 (refd)
Wagon Mound, The; Overseas Tankship (UK) v Morts Dock & Engineering Co [1961] AC 388; [1961] 2 WLR 126; [1961] 1 All ER 404 (refd)
Wong Tin Vui v Midok & Anor [1975] 2 MLJ 260 (folld)
Zainuddin v Liew Pak Fun & Anor [1962] MLJ 247 (folld)

Legislation referred to

Civil Law Act 1956 s 28A(2)(c)(iii)
Electrical Inspectorate Act 1983 s 38
Electricity Supply Act 1990 ss 53, 56(1), (2), (3)
Employees' Social Security Act 1969 s 31
Electrical Inspectorate Regulations 1984
Electricity Regulations 1994 reg 123
Electricity Supply Regulations 1990 regs 22(12)(a), (b), (16)(a), (b), (24)(a), 32(5), (6), (7)
Modification of Electrical Inspectorate Regulations Order 1990

Lee Sooi Kee and *Tiong Ngee Min* (*NM Tiong & Co*) for the plaintiff.
Ibrahim bin Hashim (*Hassan Ibrahim & Co*) for the defendants.

Abdul Malik Ishak J: 22 April 1992 must be a black day for the plaintiff. On that fateful day, as a result of a loud explosion that occurred at the switch gear room of the brand new, yet to operate electric sub-station ('sub-station') at Taman Universiti, Skudai, Johore, the plaintiff and his employer by the name of Ridzuan bin Abdul Aziz ('Ridzuan'), who were working there at the material time, sustained severe burns. Ridzuan died but as there was no medical report on him, I could not speculate on the cause of his death. Be that as it may, the plaintiff survived and, before me, claimed damages against the first defendant, the engineer in charge of the sub-station, and the second defendant, the electric undertaker of the country. The plaintiff grounded his claim on two alternative courses of action, namely :

A (1) breach of a statutory duty; and/or

(2) negligence at common law against both the defendants.

It was not disputed that Ridzuan, a former junior technician of Lembaga Letrik Negara (the predecessor of the second defendant), was a sub-
B contractor of Syarikat Rambena who contracted with the second defendant to provide service and repair to the sub-station. As a sub-contractor, Ridzuan was thus doing the job for Syarikat Rambena. This was admitted by DW1 (Zakaria bin Ismail ('Zakaria')) and DW2 (the first defendant, hereinafter referred to as 'Nasir'). It was also not disputed that the plaintiff was, at all material times, the employee of
C Ridzuan.

It was the plaintiff's case that Nasir directed both he and Ridzuan to proceed to the switch gear room of the sub-station (see the sketch plan at p 3 of the agreed bundle marked 'B') and there Nasir directed the plaintiff to go behind the switch panel as reflected in the colour
D photograph marked P1 and to open that switch panel. The plaintiff complied and Nasir inspected its contents and commented: 'Kabel itu tidak pasang dengan betul oleh technician' and he then directed both the plaintiff and Ridzuan to repair them. Nasir assured both of them that the cable switch which was located elsewhere had been switched
E off. With this assurance, both the plaintiff and Ridzuan proceeded to repair those cables. At this time, Nasir left the switch gear room and he was seen by Rosli bin Abdul Aziz (PW2 — 'Rosli'), the younger brother of Ridzuan and an employee of Ridzuan, outside the building that housed the switch gear room. Rosli saw Nasir alight from the flight of steps near to the loading bay as reflected in the sketch plan at p 31 of
F the agreed bundle marked 'B' and proceeded to Ridzuan's car which was parked outside the building. Rosli saw Nasir use the telephone in Ridzuan's car and at that point of time Rosli was tightening the screws at the leaking transformers at TX1 as per the sketch plan as directed by Nasir. Now, reverting back to the switch gear room, both the plaintiff and Ridzuan were still behind the switch panel (colour photograph P1)
G and the plaintiff was there to assist Ridzuan. The plaintiff saw Ridzuan hold a spanner in his hand and as soon as the spanner came into contact with the cable, a loud explosion occurred. Thick smoke bellowed out of the switch gear room and according to Nasir he even saw fire shooting out from under the roof. Rosli saw, to his amazement, the clothes of
H both the plaintiff and Ridzuan were on fire and they came out from the switch gear room like zombies. They were literally human torches. Rosli quickly doused the flames and escorted both of them to the specialist centre for treatment. I shall revert to this piece of evidence at a later stage. Under cross-examination, the plaintiff denied that there were warning notices affixed to the front switch panel and the rear
I switch panel as shown in P1. Zakaria, who gave evidence for the defendants, was cross-examined and it was put to him that the coloured

photographs in 'B1A', 'B2A', 'D4A' and 'D4B' which bore warning notices were installed and/or written after the incident and not before the incident.

Mr Lee Sooi Kee drew my attention to the breach of a statutory duty and referred to the pleadings where there were references to the Electricity Supply Regulations 1990, in particular regs 22, (24)(a) and 32(5) thereof. I have since checked and discovered that the predecessor to the Electricity Supply Regulations 1990 was the Electrical Inspectorate Regulations 1984 which came into force on 1 January 1984 vide PU (A) 313 and made under s 38 of the Electrical Inspectorate Act 1983. By Act 447, the Electricity Supply Act 1990 was enacted and came into force on 1 September 1990 by notification in the Gazette vide PU(B) 494/90 and by s 56(1) thereof the Electrical Inspectorate Act 1983 was repealed; but by a saving clause in s 56(2) of the Electricity Supply Act 1990, the Electrical Inspectorate Regulations 1984 made under the Electrical Inspectorate Act 1983 continued to be 'in force until revoked or replaced.' Thus, the situation was a little bit awkward because under the Electricity Supply Act 1990 the regulation entitled the Electrical Inspectorate Regulations 1984 continued to be in force. The legislature must have been aware of this embarrassing situation and by s 56(3) of the Electricity Supply Act 1990, the Minister made an order known as the Modification of Electrical Inspectorate Regulations Order 1990 vide PU(A) 4546 which came into force on 1 September 1990 wherein it modified by substituting for the words 'Electrical Inspectorate Regulations 1984' the words 'Electricity Supply Regulations 1990'. But this is not the end of the matter. By s 53 of the Electricity Supply Act 1990, the Minister made the Electricity Regulations 1994 which came into force on 30 January 1994 vide PU(A) 38. By reg 123 of the Electricity Regulations 1994, the Electricity Supply Regulations 1990 was revoked. In the context of the present case, since the incident occurred on 22 April 1992, the Electricity Supply Regulations 1990 should apply. The written submission of Mr Lee Sooi Kee adverted to the Electricity Supply Regulations 1990 and he referred to the other provisions found therein though not pleaded and on the authority of *London Passenger Transport Board v Upson* [1949] AC 155; [1949] 1 All ER 60, I have to consider those other provisions in the Electricity Supply Regulations 1990 which were not pleaded. In an illuminating judgment, Lord du Parcq had this to say in *London Passenger Transport Board v Upson* (supra):

> My Lords, the learned counsel for the appellant invited your Lordships to deal with this appeal on the footing that, notwithstanding the omission of any reference to the material statutory regulations in the statement of claim, the respondents were entitled to rely on any breach of them which the evidence established. Even without this invitation it would, I think, have been difficult for your Lordships to dispose of the appeal without regard to these regulations. To attempt to do so would be to shut one's eyes to considerations which are both relevant and important.

A I shall now proceed to consider the relevant provisions in the Electricity Supply Regulations 1990 ('the ES Regulations').

Regulation 22(12)(a) of the ES Regulations reads as follows:

> A standard notice displaying the words 'DILARANG MASUK' shall be placed outside every place containing electrical apparatus where
B unauthorised interference with such apparatus may reasonably be expected and where such interference would be dangerous, and the said notice shall be maintained in a clearly legible condition.

As to the size of that standard notice, it is stated in reg 22(12)(b) of the ES Regulations as follows:

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> The standard notice shall be of metal, enamelled or painted white, 350 millimetres wide and 240 millimetres high with lettering in black, and at the middle, the words 'DILARANG MASUK' shall be inscribed in block capital letters, the inscription being 290 millimetres long and 30 millimetres high, uprights of letters being 6 millimetres wide.

D Regulation 22(16)(a) of the ES Regulations reads as follows:

> Every switchboard having bare conductors normally so exposed that they may be touched shall, if not located in an area set apart for the purpose thereof, be suitably fenced or otherwise enclosed, where no person except an authorised person, or a person acting under the immediate supervision
E of an authorised person, shall have access to any part of an area so set apart, and a standard notice displaying the word 'BAHAYA' shall be placed near the switchboard, and shall be maintained in a clearly legible condition.

Regulation 22(16)(b) of the ES Regulations reads thus:

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> The standard notice shall be of metal, enamelled or painted white, 240 millimetres wide and 350 millimetres high with lettering in scarlet and at the top, it shall bear a line of three conventional thunderbolts each 80 millimetres high and 6 millimetres wide at the broadest part, and below these the word 'BAHAYA' shall be inscribed in block capital letters, the inscription being 190 millimetres long and 28 millimetres high, uprights
G of letters being 6 millimetres wide.

Regulation 22(24)(a) of the ES Regulations reads as follows:

> Adequate precautions shall be taken to prevent any conductor or apparatus from being accidentally or inadvertently made alive when persons are working thereon.

H Regulation 32(5) of the ES Regulations is worded thus:

> All persons engaged on work in connection with erection, maintenance or dismantling of any installation or equipment of any installation shall be adequately protected from danger, and the responsibility for affording such protection shall rest with the licensee or owner or management or
I contractor.

Regulation 32(6) of the ES Regulations reads as follows:

When persons are engaged on work on circuits controlled by switches not under their immediate supervision, such switches shall, where possible, be locked in the 'OFF' position until the work is finished —

(a) in the case of overhead lines works, suitable notices shall be hung on the switches and suitable earthing using earthing sticks fitted at visible distance to the workmen shall be fixed; and

(b) in the case of underground cabling works, a suitable notice shall be hung on the switch, to warn all persons that there are men at work on the circuit and that the switches should not be closed.

Finally, reg 32(7) of the ES Regulations reads as follows:

If the circuits are normally operated at high voltage or extra high voltage, the switches referred to in paragraph (6) shall be locked or put in the 'OFF' position by an authorized person, and unless the authorized person himself takes charge of the work, no work shall be started until a written instruction or Permit To Work Certificate has been issued by the authorized person to a competent person in charge of the workmen, and the authorized person shall not unlock or reclose the switch until he has received a written notice or clearance certificate from the competent person that all persons are clear of the circuits concerned and have been warned that the circuits are to be made alive, and in addition, a visible break shall be made in the circuit by opening isolators or fuses before work is commenced on the circuit, except where totally enclosed isolators are installed, the design of which is approved by the Director General.

Now, in appraising the evidence I must not lose sight of the sketch plan at p 31 of the agreed bundle marked 'B' which depicted the layout of the sub-station, the various photographs referred to and marked accordingly in the course of the trial and the oral testimony of the relevant witnesses. Attempts were made by both parties in the course of the trial to establish:

(1) that there were warning notices to the front and the rear switch panels as reflected in the coloured photograph marked as 'P1' through cross-examinations of the plaintiff and these were flatly denied by the plaintiff;

(2) Zakaria admitted under cross-examination by Mr Lee Sooi Kee that the cardboard notices in the coloured photographs marked as 'B1' and 'B2' were hung by him but they were not of the standard sizes. Zakaria denied under cross-examination that the coloured photographs at 'D4A' and 'D4B' were taken one or two years after the incident and he stated that those photographs were taken when the sub-station was re-activated. Zakaria denied that the notices that appeared in the coloured photographs marked as 'B1A' (similar to 'B2') and 'B2A' (similar to 'B1') were displayed after the incident and here Mr Lee Sooi Kee put across the point that the cardboard notices would have been destroyed by the explosion which point was denied by Zakaria;

(3) Zakaria admitted under re-examination by Mr Ibrahim Hassan that the notices were not in the form of 'metal, enamelled or

painted white' and he agreed that such notices were not displayed at the entrance to the switch gear room.

I hold as a fact that the standard notices as required under reg 22(12)(b) and reg 22(16)(b) of the ES Regulations were not displayed at the entrance of the switch gear room and on the front and rear switch panels. Even Dr N Subramaniam (SP4) under cross-examination stated that a big warning sign should be posted outside the sub-station. I also hold as a fact that the cardboard notices were displayed after the incident because they appeared to be new notwithstanding that those cardboard notices bore a date prior to the incident. The loud explosion as related by the plaintiff, Rosli and even Nasir together with the thick black smoke and the fire that was seen by Nasir shooting out through the roof of the switch gear room must have been of such magnitude that the plaintiff and Ridzuan became human fireballs. The charring of the wall as reflected in photographs 'B2', 'B1A' and 'P1' and in the words of Dr N Subramaniam (SP4) '... perhaps a major accident might have taken place because of the evidence of charring ... . By charring I meant an unburnt carbon and the smoke that came up ...' would surely have affected the cardboard boxes and, consequently, I hold as a fact that Zakaria hung those cardboard notices after the incident. It is part and parcel of my judgment and it is my finding of fact that photographs 'D4A' and 'D4B' were taken after the incident and the writings that appeared thereto were made after the incident for two main reasons. Firstly, both the plaintiff and Rosli were not cross-examined at all about the photographs 'D4A' and 'D4B' and the writings that appeared therein. Secondly, the photographs 'D4A' and 'D4B' surfaced when Dr N Subramaniam (SP4) was cross-examined by Mr Ibrahim Hassan. One may perhaps wonder why it was raised at that stage and not earlier unless the reason being it was available on a later date and not earlier.

It was said that only Zakaria was an authorized person under the ES Regulations (see the authority accorded to Zakaria at p 30 of the agreed bundle at 'B') and that the plaintiff and Ridzuan failed to heed the warning of Zakaria not to do any work in his absence. Regulation 32(4)(a) of the ES Regulations was relied upon and for convenience it is reproduced below:

> No person except an authorized person or a competent person acting under the immediate supervision of an authorized person shall undertake any repair, alteration, extension or cleaning of apparatus which forms part of an installation.'

It was also argued that Zakaria did not issue the Permit To Work certificate to Ridzuan at all. This was indeed true. And if Zakaria wanted to issue that Permit To Work certificate he could only issue to Ridzuan but not to the plaintiff. But what was crucial in the evidence of Zakaria was his admission, under cross-examination, that Nasir was an authorized person to enter the sub-station. Nasir on the other hand stated, under cross-examination, that he was not an authorized person.

This contradiction serves to weaken the defence case. To confound the matter further, Mr Ibrahim Hashim whilst cross-examining the plaintiff drove home the point that :

> Soalan : Adakah Zakaria beritahu Ridzuan dan awak — tidak boleh jalankan kerja-kerja di tempat tersebut tanpa kehadiran dan pengawasan Nasir?
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> Jawapan : Betul. Zakaria kata kalau dia tidak ada ta' usah buat sebab dia hendak ke Pasir Gudang dan dia minta kami berdua (Ridzuan dan saya) tunggu Engineer Nasir.

without realizing that 'pengawasan' means 'supervision' and under reg 32(4)(a) of the ES Regulations, the supervisor will have to be an authorized person. That Nasir was an authorised person was finally laid to rest by his own admission when he stated that 'peranan saya ialah untuk menentukan bahawa sub-station itu siap dan boleh digunakan.' Since Zakaria agreed that he was not present when the incident happened, we are now left with Nasir, an authorized person under the ES Regulations, to supervise the plaintiff, Ridzuan and Rosli at the sub-station. Rosli corroborated the evidence of the plaintiff when he stated that Nasir directed the plaintiff, Ridzuan and himself to proceed to the switch gear room. As Rosli walked up the flight of stairs and upon reaching the landing and as he was about to enter the switch gear room which was opened at that time, Nasir directed him to tighten the screws at TX1 and for this purpose he had to go downstairs to do it. This prevented him from entering the switch gear room. Though Rosli later stated that he saw Nasir came down from the flight of stairs and used Ridzuan's telephone, yet he did not see whether Ridzuan and the plaintiff had entered the switch gear room. Rosli also did not see Nasir entering the switch gear room. But the strong inference that both the plaintiff and Ridzuan entered the switch gear room with Nasir could be distilled from the evidence of the plaintiff himself. The plaintiff as an employee of Ridzuan would not have entered the switch gear room unless he was directed and such direction, I hold as a fact, came from Nasir. The same was true for Ridzuan. It must be borne in mind that Nasir's position as an engineer must be the influential factor that regulated the conduct of both the plaintiff and Ridzuan. As an engineer with the second defendant, Nasir's words must have been accepted by both the plaintiff and Ridzuan as gospel truths. More so Nasir was also an authorized person as represented by Zakaria. Thus, when Nasir assured both the plaintiff and Ridzuan that the switch gear room was safe, they must have believed him. It is my judgment and I so hold as a fact that Nasir had assured both the plaintiff and Ridzuan of the safety of that switch gear room. Ridzuan was formerly a junior technician with Lembaga Letrik Negara (the predecessor of the second defendant) and he must have known the danger of working in the switch gear room. As I have held earlier on, the standard notices were not displayed at the relevant portions of the sub-station and this too must have swayed both the plaintiff and Ridzuan to accept Nasir's assurances that the place was indeed safe.

A Zakaria testified that both the plaintiff and Ridzuan were supposed to cut the plate cover for panelling in the sub-station on that fateful day and that according to him that kind of work was not dangerous at all because it would be done outside the switch gear room. If it was true that that kind of job was not dangerous at all why must Zakaria ensure that the sub-station was not 'alive' before Ridzuan started cutting the plate cover! Why the need for Zakaria to remind Ridzuan that Zakaria must be informed before the job of cutting the plate cover began? Why the need to be cautious if that kind of job was not dangerous at all? Nasir supported Zakaria's version that the job for that day was to cut the plate cover. It seemed that Nasir obtained this piece of information through the conversation which he had with Ridzuan at the cable cellar room. Nasir explained that the plate cover was meant to cover the gap at the cable of the panel switch gear that was located inside the switch gear room. Nasir elaborated and said that he spoke to Ridzuan at the cable cellar room for about 10 to 15 minutes and that cable cellar room was located at the ground floor of the sub-station which was not reflected in the sketch plan at p 31 of agreed bundle 'B'. Nasir testified further that he left Ridzuan at the cable cellar room before he proceeded to Ridzuan's car to borrow his telephone there and it was at that juncture that he heard the loud explosion. Nasir testified that his conversation with Ridzuan at the cable cellar room was witnessed by the plaintiff, Rosli and one other unknown employee of Ridzuan.

Now, the defence versions that:

(1) the plaintiff and Ridzuan were supposed to cut the plate cover for panelling in the sub-station;

(2) the plate cover was meant to cover the gap at the cable of the panel switch that was located in the switch gear room;

(3) Nasir spoke to Ridzuan in the presence of the plaintiff, Rosli and another unidentified employee of Ridzuan for 10 to 15 minutes at the cable cellar room just before the explosion;

(4) the cable cellar room was located at the ground floor of the sub-station;

(5) Nasir left the plaintiff, Rosli and Ridzuan together with another unidentified employee of Ridzuan at the cable cellar room immediately before the explosion; and

(6) the explosion occurred in the cable cellar room and not in the switch gear room.

were, sad to say, not put across during cross-examinations of the plaintiff and Rosli. As Thomson LP (as he then was) in *Seng Chong Metal Works Ltd v Lew Fa* [1966] 2 MLJ 63 succinctly observed:

> Mr Cashin put it to us that there was a possibility that he was, as it were, lounging against the machine and his hand slipped in. Of course that is a possibility. Everything is a possibility. But there was the plaintiff's own evidence which was not contradicted that he was operating the machine

> and the hypothesis advanced by counsel was not put to him in cross-examination.

Gill J (as he then was) adopted the same stand in *Shamsudin v Yap Choh Teh & Anor* [1969] 1 MLJ 26 when he said:

> As was pointed out by counsel for the plaintiff, the plaintiff and his witnesses were not cross-examined on the question of the explosion after the all clear. Their story on that point in fact was not challenged. All that was put to the plaintiff was that he did not take the right type of cover for his own safety.

Finally, Chang Min Tat FJ (as he then was) in *Foong Gun Mooi v Lim Yeok Soon* [1978] 1 MLJ 218 (FC), in the same vein echoed the same principle when his Lordship observed:

> Again, it was never put to the motorist that she was chatting with her husband, so that she had not the opportunity to deny it. As for the charge that she was probably looking at her baby whilst driving that was clearly speculative. No evidence was adduced to support it. She was never asked to admit or deny it. It was not even suggested by the motor-cyclist.

On the other hand of the scale, the plaintiff's story was analytically put across to Zakaria and Nasir. On appraisal of the defence story it was nothing more than a denial of the plaintiff's case. Nasir denied being present in the switch gear room and giving the instructions to the plaintiff and Ridzuan to open the switch panel and repair the cable that was incorrectly installed. Nasir also denied that he assured both the plaintiff and Ridzuan that the sub-station was safe. These denials will certainly not put the defendants in good stead. It is my judgment that the explosion took place at the switch gear room and not in the cable cellar room. It is also my judgment and my finding of fact that the sub-station is the property of the second defendant and they are responsible to ensure that both the plaintiff and Ridzuan be adequately protected from danger and it is their responsibility as the 'management' to afford such protection as envisaged under reg 32(5) of the ES Regulations. Clearly from the evidence the second defendant through the first defendant did not manage the sub-station in such a way as to protect both the plaintiff and Ridzuan from danger and to use the words of Dr N Subramaniam (SP4) the defendants should have guarded the sub-station 'like a hawk'. Dr N Subramaniam (SP4) described the 22 kv sub-station as extremely dangerous and a properly qualified personnel should man the place. Though the said doctor did not visit the sub-station he was of the opinion that 'charring' as reflected in the photographs reflect that a major accident might have taken place. The said doctor was also of the view that the sub-station came within the ambit of r 32(7) of the ES Regulations because of its extra high tension 22 kv. The said doctor rightly described the source of power of sub-station to come from outside that sub-station. The magnitude of the breach of r 32(5) of the ES Regulations was enhanced by the evidence of the said doctor when he said, in relation to the coloured photographs at 'B1' and 'B2' (the enlarged versions), that one could identify the

A sub-station to be operational by the red light that will appear on the switch of the cabinet and that the green light appear on the same switch cabinet to indicate that the sub-station was safe. Unfortunately, Zakaria and Nasir did not explain whether the red and green indicators were functional on that day. This meant that the defendants had breached reg 32(5) of the ES Regulations.

B

It was urged not to accept Dr N Subramaniam (SP4) as an expert witness because this was the first case for him to testify in court and his field of specialization was microwave propagation and electro magnetic compatibility. It must not be forgotten that Dr N Subramaniam (SP4) is highly qualified. He possesses a first class honours degree in Electrical C Engineering from the University of Malaya in 1972 and a Masters degree in Engineering Science from the same university in 1976. Finally, in 1987 he secured his Doctor of Philosophy from the same university. He is currently a corporate member of the Institution of Engineers Malaysia since 1984 and a full professional engineer under the Board of D Engineers in 1972. Currently, he is an Associate Professor of Engineering in the same university. He emphasized, under cross-examination, that he prepared a report to the insurance in regard to an explosion that occurred in the Bharag Heavy Industries where he pointed out that the engineers that repaired the turb alternators made mistakes that caused the second defendant considerable amount of wastage of time and E money. He explains that electro magnetic is the study of simple electricity and simple magnetism which when combined together leads to the theories of transformers and machines. All things said and done, the ultimate decision on the question as to the expertise of Dr N Subramaniam (SP4) would rest entirely with the court. Being a first F timer does not bar the court from holding that the said doctor is an expert. The said doctor had explained in detail the nature of the sub-station and referred to the relevant photographs and agreed that he was briefed by the learned counsel for the plaintiff before he came to court. All the same, he was able to express an opinion on those photographs by correlating them with his knowledge of electricity: *Ang Chwee Keong* G *v R* [1955] MLJ 36; *Sim Ah Seng v R* [1951] MLJ 150; and *PP v Lee Ee Tong* [1953] MLJ 244 as cited in *Chin Sen Wah v PP* [1958] 24 MLJ 154. Hashim Yeop A Sani J (as he then was) in *Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 233 observed that:

> H To qualify to give such evidence the witness must satisfy the court that he is indeed an expert, that he is specially skilled in the field of the enquiry carried out by him. An expert is one who is skilled in any particular art, trade or profession being possessed of peculiar knowledge concerning the same. The witness must have made a special study of the subject or have acquired special experience on the subject.

I These words would aptly describe Dr N Subramaniam (SP4) and I hold that he is an expert despite the admissions that he did not visit the sub-station after the explosion and that he never gave evidence in court before.

On breach of statutory duty, the evidence that the plaintiff had suffered injuries and damage as a result of entering the switch gear room was all that was needed before considering whether the defendants were liable. I can do no better than to quote the erudite words of Lord Atkin in *Smith v Cammell, Laird & Co Ltd* [1940] AC 242 especially at p 258 where his Lordship had this to say:

> It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another.

The facts in *Smith v Cammell, Laird & Co Ltd* (supra) may briefly be stated thus. There the respondents were constructing in their shipbuilding yard a vessel for shipowners, which had been launched and placed for finishing in a wetdock in that yard. For the purposes of their building operations the defendants had erected in the lower forehold of the vessel a staging, which they no longer used themselves. The shipowners employed an insulation company to do certain work in the vessel, and the respondents allowed that company to occupy and use the staging in the course of their work. Owing to a defect in the staging, the appellant, an employee of the insulation company, while engaged in their work, fell from the staging and was injured. In respect of his injuries he sued the respondents, claiming damages which he alleged were caused by their negligence and by their breach of the statutory duty cast upon them by the Regulations. It was held, inter alia, that the obligation cast upon the occupiers of a factory by the Regulations requiring that all staging should be securely fastened and maintained in such a condition as to ensure the safety of all persons employed was an absolute one.

It is germane to mention here that the principles in *Smith v Cammell, Laird & Co Ltd* were considered and applied in *Lim Thong Eng v Sungei Choh Rubber Co Ltd* [1962] MLJ 15. I venture to say that once it has been proved that a particular statutory duty has not been performed, it becomes actionable without having to prove any lack of care or diligence on the part of the person on whom the duty is imposed. In short, what matters is simply to show the non-performance of the act which the statute requires a person to perform, and that non-performances is in itself negligence on the part of that person. To take another example, the case of *Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1 at p 9 may be cited where Lord Atkin in almost similar vein said:

> The employer is alleged to have committed a breach of a duty owed by him to his servant to take a particular precaution (namely, support of the roof) for his servant's safety whereby the servant was injured. In my opinion, that state of facts constitutes negligence of the employer; and I am unable to conceive of any accurate definition of negligence which would exclude it. All that is necessary to show is a duty to take care to avoid injuring, and if the particular care to be taken is prescribed by statute, and the duty to injured person to take the care is likewise

A imposed by statute, and the breach is proved, all the essentials of negligence are present.

Buxton v North Eastern Ry (1868) LR 3 QB 549, per Lush J at p 554; *Dixon v Great Western Ry* [1897] 1 QB 300, per Lopes LJ at p 304; and *Cooper v Railway Executive* [1953] 1 WLR 223; [1953] 1 All ER 477 all B lay down the singular principle of an absolute duty on the part of a railway undertaker to make and maintain fences for the benefit of the owners and occupiers of lands, adjoining the railway. Likewise, the same duty was imposed on a canal company to make compensation for damage, caused by accident (*Makin v London North Eastern Railway* [1943] KB 467). Then again where a statute provided that Drainage C and Navigation Commissioners should make, maintain and repair certain lands in Lincolnshire, there was imposed upon them an absolute obligation to maintain, repair and keep in repair such drainage works as 'in the judgment of themselves and their engineer are proper and necessary for the drainage of the Ancholme Level.' (*Boynton v Ancholme* D *Drainage and Navigation Commissioners* [1921] 2 KB 213 at p 235).

The English Court of Appeal in *Vyner v Waldenberg Brothers, Ltd* [1946] 1 KB 50 CA held that where 'there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of E proof shifts onto the employer to show that the breach was not the cause.'

In my judgment there is no necessity for the plaintiff to prove as to how the explosion occurred. So long as the defendants were in breach of the ES Regulations and that the accident would not have occurred but for that breach, the plaintiff's claim would succeed even F though the plaintiff had not given an acceptable version of how the accident had occurred: *Allen v Aeroplane And Motor Aluminium Castings Ltd* [1965] 1 WLR 1244; [1965] 3 All ER 377 (CA). Incidentally, Lord Diplock in delivering a concurring judgment in *Allen v Aeroplane And Motor Aluminium Castings Ltd* (supra) cited with approval *Uddin v* G *Associated Portland Cement Manufacturers Ltd* [1965] 2 QB 582; [1965] 2 WLR 1183; [1965] 2 All ER 213 and observed that:

> It is perfectly clear ... that it is unnecessary to show that the employee, when injured, was injured in the course of his employment: it is sufficient that he should be employed at the premises.

H Nearer home we have three cases to consider.

For a start, I shall refer to *Lim Thong Eng v Sungei Choh Rubber Co Ltd* [1962] MLJ 15 where Ong J (as he then was) after considering *Smith v Cammell, Laird & Company Ltd* (supra) had this to say:

> I It only remains, therefore, to consider: first, whether there was an omission to equip the machinery with such appliance as 'shall positively prevent the hands of the operator being brought into dangerous proximity to the point of contact or mesh of the rolls'; secondly, whether the plaintiff's injury was a direct consequence of the defendant's failure to instal such

appliance. The answer to both questions must accordingly to plain common sense, be in the affirmative. A

Next, *Mohamed Husin v Shum Yip Leong Rubber Works Ltd* [1972] 1 MLJ 17 where Yong J (as he then was) after considering the various rules under the Machinery (Driven Machinery) Regulations 1959 said:

> On the evidence before me I am satisfied and find as a fact that the defendants in breach of their statutory duty had failed to fix any guard of any kind either in the front or feeding side or on any side of the ram or cutter to prevent the fingers of the feeding operator from reaching the danger zone. In my opinion this failure to comply with the Machinery Regulations was the fundamental and proximate cause of the accident. Had a guard in front of the cutter been fixed or installed, with a gap high enough to admit the rubber sheets and low enough to bar the entry of the operator's fingers, accidents such as this would not have occurred. B C

Finally, in *Ramakrishnan v Lembaga Letrik Negara, Malaysia* [1981] 2 MLJ 347 where Arulanandom J (as he then was) said:

> In the present case the defendant ought to have known poles in unoccupied land especially H-poles will invariably tempt children to climb them, even if it was not for the purpose of releasing birds trapped on top of them. And there was nothing whatsoever to suggest that there was imminent peril in climbing them. And the defendant had therefore not discharged their duty of care to others when installing and maintaining that H-pole. D E
>
> The defendant was therefore held liable in damages to the plaintiff, and judgment was entered in the agreed sum of $34,000 for the plaintiff with costs.

In relation to the ES Regulations, the defendants' statutory duty can be said to be absolute. Standard notices were not displayed outside every place containing electrical apparatus and near the switch board. In fact there was clear admission that there was no warning notice in the form of 'DILARANG MASUK' at the entrance to the switch gear room. The notices as reflected in the photographs were nothing more than mere after thoughts as they were, as held earlier, displayed after the accident. Breaches of reg 22(12)(a) and 22(16)(a) of the ES Regulations were blatantly contravened by the defendants with impunity. The defendants failed to adequately protect from danger the plaintiff while he was at work in the sub-station as set out in reg 32(5) of the ES Regulations and indeed when the explosion took place adequate precautions were not exercised by the defendants as envisaged under reg 22(24)(a) of the ES Regulations. F G H

On negligence at common law, to recapitulate when Nasir assured both the plaintiff and Ridzuan that the sub-station was safe, that was the duty of care that Nasir owed to both of them. And when the explosion occurred that duty of care had been breached. Basically that was the negligence of not only Nasir but also the second defendant. As an engineer and an authorized person Nasir must have foreseen that the sub-station would be a potential danger to the plaintiff and Ridzuan if I

electricity were to flow to that sub-station. In fact Zakaria agreed that the switch box was not earthed and Dr N Subramaniam (SP4) confirmed that if it was properly earthed, it would not be dangerous. In the initial part of his evidence, Nasir spoke of his role in relation to the sub-station. Nasir stated, 'Peranan saya ialah untuk menentukan bahawa sub-station itu siap dan boleh di gunakan', and in that capacity he owed a duty of care to take reasonable care to avoid acts or omissions which he could reasonably foresee would likely injure a person so closely and directly affected by his acts or omissions. *Cunard & Anor v Antifyre Ltd* [1953] 1 KB 551; [1932] All ER Rep 558 defines negligence as the absence of the care which a prudent and reasonable man would take in the circumstances. It is said that the duty to take care to avoid doing injury is owed to all who are likely to suffer injury if the duty is neglected, whatever form the injury may take. It is my judgment that the second defendant as the undertaker of the electricity and the owner of the sub-station owed a duty of care to take reasonable care to avoid acts or omissions which the second defendant could reasonably foresee would be likely to injure the plaintiff by their acts or omissions and the second defendant ought to have the plaintiff in contemplation as being so affected (*Buckland v Guildford Gas Light and Coke Co* [1949] 1 KB 410; [1948] 2 All ER 1086). In my judgment, the plaintiff and Ridzuan were the persons to whom the defendants owed a duty to take all reasonable steps to prevent the existence of a hidden peril. It is clear from the evidence that the defendants failed to earth the panel and switch off the supply of electricity to the cable — that was the sum total of the defendants' negligence that led to the explosion.

My attention was drawn to the case of *London Graving Dock Co Ltd v Horton* [1951] AC 736; [1951] 2 All ER 1 where it was held, inter alia, that it was the defendants' duty to provide reasonably safe premises or else show that the plaintiff had accepted the risk with full knowledge of the dangers involved; it was not necessary to show that he was volens as well as sciens, as the duty owed by an invitor to an invitee was not so high as that owed by an employer to an employee; the question whether the plaintiff undertook the risk of performing his task with full appreciation of the danger was a question of fact to be decided by the tribunal which tried the case, and, on the facts, the trial judge had ample evidence for his finding that the plaintiff had full knowledge of the nature and extent of the risk which he ran; and, therefore, the defendants were freed from liability for damage occasioned by the insecurity of their premises. Using this case, the defendants argued through Mr Ibrahim Hassan that the defendants had discharged their duty towards the plaintiff as an invitee and consequently the common law negligence should not be put to the defendants. With respect, the facts in *London Graving Dock Co Ltd v Horton* (supra) are different from the present case. There, the plaintiff, a welder, was employed by sub-contractors to weld strips of steel on the ribs of a trawler which the defendants, the head contractors, were reconditioning. While working in the fish house (part of the hold), the welders had to work in pairs on

a staging provided by the defendants and comprising four boards, five feet apart, supported on iron beams on angle-irons, placed across the fish house at a height of five feet, five inches, from the bottom of the trawler. There were no cross boards to the staging, and the only means of gutting from one board to another was by stepping on an angle-iron. The staging was under the exclusive control of the defendants, and the sub-contractors' workmen had no right to interfere with it, but they had complained of its insufficiency to the defendants' charge-hand shipwright who had promised that something would be done to remedy the defect. Nothing, however, was done. On 16 December while working on the staging, the plaintiff placed one foot on a plank and the other foot on an angle-iron to pass a tool-box to a fellow welder, and, while so engaged, he slipped and was injured. There was no contributory negligence on his part. In an action brought by him against the defendants, claiming damages for negligence, it was established that the accident was caused by the insufficiency of the staging. The distinguishing feature that differentiates *London Graving Dock Co Ltd v Horton* (supra) from the present case is that there the workmen knew that the staging was faulty and still took the risk of using it. Here, the plaintiff together with Ridzuan did not know that there was electricity in the sub-station. They were both assured by Nasir that the sub-station was safe. Here, when the plaintiff and Ridzuan undertook the task of repairing the cable at the switch gear room, they undertook the task without full appreciation that the sub-station was 'alive'. On the facts of the present case, I have no hesitation to hold, and I so hold, that the defendants were negligent. Dr N Subramaniam (SP4) stated that the red and green lights were the best indicators to show whether the sub-station was operational. Bereft of any evidence by the defendants that the indicators were functional how could the plaintiff be said to have contributed to his own misfortune by not paying attention to those indicators. Both the plaintiff and Ridzuan were very cautious. They did not enter the switch gear room by themselves. They waited for Nasir to give them the instructions. In short, as an injured party the plaintiff took reasonable care of himself and did not contribute to his own misfortune. From the authorities, it is clear that when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, then if the plaintiff is part author of his own injury, he cannot call on the defendants to compensate him in full. The question to ask is this: was there sufficient evidence to show a lack of reasonable care by the plaintiff for his own safety? Without hesitation, I would answer this question in the negative.

For the reasons adumbrated above, it is my judgment that the defendants had breached their statutory duty and were negligent in not ensuring that the sub-station was safe. It is also my judgment that the plaintiff was not part author of his own misfortune. I therefore hold the defendants wholly liable.

A On contribution of the plaintiff to SOCSO, the plaintiff on being recalled stated that he used to hear the term SOCSO and he explained further that in Malay that would refer to PERKESO. He categorically stated that he did not at any time register himself with PERKESO. The defendants tendered a letter marked as exh 'D6' from PERKESO dated 5 January 1995 and that letter was worded as follows:

B

Pejabat Tempatan
Pertubuhan Keselamatan Sosial
PERKESO

5 Januari 1995

C Tetuan Hassan Ibrahim & Co,
Suite 508-510, Tingkat 5,
Merlin Tower,
Jalan Meldrum,
80000 Johor Bahru.

D

Tuan,

Per: Mahkamah Tinggi di Johor Bahru
Guaman Sibil No 22-346-1993

E Saya merujuk surat tuan HI AD MNI 1443/93 bertarikh 5.1.95.

2 Mengikut rekod yang ada di pejabat ini:

(i) Majikan Ridzuan Bin Abd Aziz tiada berdaftar dengan pejabat ini.

(ii) Pekerja Abdul Ghani bin Hamid pernah diinsurankan dengan
F PERKESO bagi tempoh 28.3.88 hingga 31.5.88. Tiada rekod menunjukkan beliau di bayar apa-apa faedah.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

G Saya yang menurut perintah,

tt
(Mohd Husni bin Muhammad)
Pengurus Pejabat Tempatan,
Perkeso, Johor Bahru.

H Unfortunately, 'D6' was not shown to the plaintiff when he was being recalled. 'D6' does not show that the plaintiff had been paid as a result of the accident in the sub-station. 'D6' shows that the plaintiff used to be insured by PERKESO between 28 March 1988 to 31 May 1988. No evidence was adduced that the plaintiff was insured by PERKESO on 22 April 1992 — the date of the explosion at the sub-station. If the
I defendants thought that they could rely on s 31 of the Employees' Social Security Act 1969 (Act 4) which reads as follows:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under the Act.

in an attempt to bar the plaintiff from filing the present suit, with respect, that was wishful thinking. It is my judgment that the plaintiff was not an insured person on the date of the explosion and, consequently, s 31 of the Employees' Social Security Act 1969 (Act 4) is not applicable. It is also my judgment that the plaintiff, as an aggrieved party, is entitled to file this suit in this court.

QUANTUM

Both the plaintiff and Ridzuan were sent to the Medical Centre Johore for treatment. Only the plaintiff was admitted. Ridzuan was refused admission because his injuries were too severe. This was the attitude of that specialist centre and that attitude reflect badly on the medical practitioners in that specialist centre. Ridzuan was then admitted to the Sultanah Aminah General Hospital where he succumbed to his injuries. Be that as it may, the plaintiff was admitted to the Medical Centre Johore on 22 April 1992 till 16 May 1992 and according to the medical report dated 7 June 1992, the plaintiff had '3% electrical burned over head, face, both lower arms and both ant legs about 30% on 22 April 1992' and 'now still follow up on our OPD and unable to work till today'.

A medical report dated 20 May 1994 from Anga Plastic & Cosmetic Surgery described the facial scars sustained by the plaintiff in the following terms :

> Ear: Both the ears are badly deformed by scarring along the rim of the ears.
>
> The ears are club-shape.
>
> Mouth: Eversion of the lower lip and pulling of the corners of the upper lip with minimal (1 cm) mouth opening only.
>
> Hypertrophic scars extending from the ears, along the lower border of mandible on both sides to the submentum and below the lower lip.
>
> Opinion: Ghani must sustained deep to full thickness dermal burns of the face. The burn wounds had healed with hypertrophic scarring. The hypertrophic scarring along the rim of the ear has contracted and has clubbed the ear. Surgery can be done to improve this though it will never be possible to reconstruct it to its original shape.
>
> The scarring around the corner of the mouth and lower lip has resulted in his inability to open his mouth and eversion of the lower lip. This can be corrected by release and cover with full thickness graft and nasolabial flap.
>
> The scars along the border of the mandible can be improved to a certain extent.

A The total cost of the surgery is about RM5,000 to RM7,000.

Another medical report dated 30 August 1994 from Anga Plastic & Cosmetic Surgery gave a more realistic cost to surgically correct the deformities of the plaintiff's hands and that report reads thus :

B The cost of RM5,000 to RM7,000 is for the facial reconstructive surgery only.

He needs multiple operation in stages to correct the deformities of the hands. It is difficult to accurately estimate the cost of these surgeries. It may cost RM30,000 (Thirty Thousand Ringgit) or more.

C Raj Orthopaedic Surgery prepared another medical report on the plaintiff dated 2 April 1994 and that report touched on the then medical complaints of the plaintiff. Incidentally, that medical report was quite thorough as it touched on all aspects of the plaintiff's injuries and certainly that report merits reproduction.

D Present complaints

(1) Scarred face:
— is unable to smile.
— the mouth opening is fixed and he cannot open further.
— he cannot close his mouth tightly.

E The lips can only just make contact.

(2) Scarred hands :
— the fingers are scarred and cannot be moved.
— fingers are deformed.

F — cannot hold object.
— can hold a pen or spoon (weak pinch) between thumbs and side of index finger.

(3) Ugly, thick scars both lower limbs:
— scars over the knees and are itchy and painful.

G Physical examination

(1) Permanent scars (limbs)

50 x 25 cm circumferential, thick (keloidal in places), scars over right lower thigh, knee and upper tibia.

H 23 x 20 cm thick, firm scar anterior left knee.

25 x 11 cm scar medial left leg.

26 x 6 cm scar lateral left leg.

32 x 20 cm circumferential scar right forearm and arm.

30 x 18 cm circumferential scar left forearm and lower arm.

I 16 x 9 cm scarred dorsum of right hand.

13 x 5 cm scarred dorsum of left hand.

(2) Scars (face).

35 cm thick scar along chin (ear to ear).

Scarred edges of both ears (with loss of part of cartilage).

Soft second degree burn scar on the face (both cheeks).

Edges of mouth are scarred (8 cm), with thickened lips and inability to open the lips. He cannot smile (mouth has only one expression).

(3) Scars (right hand).

The 3rd and 5th fingers are scarred down into flexion, with no residual function.

The index (2nd) finger is scarred in extension.

He can slightly adduct the finger to pinch to the thumb.

The thumb is scarred in adducting, with only the tip able to pinch side to side with index.

(4) Scars (left hand).

The 2nd and 5th fingers are scarred inflexion, with no function.

The 3rd and 4th fingers are scarred in hyperextension, with no function.

The thumb is scarred in adduction with minimal and weak side to side pinch to index.

X-Ray examination

The fingers are scarred in the positions described above.

Opinion

As a result of the accident on 22 April 1992, Ghani has suffered severe third degree electrical burns.

(1) The degree of scarring is so extensive that it is hard to describe in a report. Photographs of the patient are necessary to visualise the damage, especially to his hands.

(2) For practical purposes, he has lost nearly all the functions of both his hands. The extensive scarring is unlikely to be amenable to further surgery. He is just about able to hold a pen or spoon, in a very weak side to side pinch between thumbs and index. This may allow him to feed himself with a spoon, but he will not be able to lift a cup to drink. He will not be able to return to his previous job, which required use of hammers, pliers, screw drivers etc,

(3) The scarring of the face is ugly and the inability to open his mouth fully will make it difficult to bite into large pieces of food. He will have to eat food in small pieces.

(4) It is recommended that Ghani consult a plastic surgeon to see if any further improvement for his mouth can be achieved.

(5) He also complains of loss of hearing of left ear due to the blast. An ENT opinion is adviceable. There is also scarring of his left eye, secondary to the burn. An opthalmologist opinion is needed to rule out any future problems to the eye (eg cornea opacity).

A consultant ophalmologist examined the eyes of the plaintiff and in his medical report dated 5 July 1994, the said doctor reported that:

> An examination on 19 May 1994 showed that the visual acuity in his right and left eyes are normal, ie 6/6 in each eye.
>
> The eye ball and eye lids are all normal. The eye movements are also normal.
>
> My impression is that he has not suffered permanent damage to his eyes because of the burn.

An ENT report dated June 27, 1994 revealed that 'the ears showed mild deformity due to the scarring with mild stenosis of the ear canals. Both ear drums appeared to be intact. The throat, larynx appeared normal. His hearing is decreased on both sides.' The ENT specialist did investigations on the plaintiff and in the same medical report reported that:

> (1) an audiogram done revealed bilateral high frequency deafness more on the right side.
>
> (2) X-ray of the sinuses revealed no abnormality.

The ENT specialist gave an opinion in the same medical report and this was what he opined:

> As far as his hearing is concerned, the patient has suffered a bilateral high frequency deafness of around 60-80 dB on both sides. This, I think is permanent and the patient be given the benefit of doubt.

All in all, there were six medical reports prepared by the relevant doctors on the plaintiff's medical conditions and all these reports were agreed upon and marked as exh 'B' and on the authority of *Sundharan a/l Ramasamy & Anor v Loo Soon Mook @ Loo Koon Lay & Anor* [1994] 3 CLJ 385, I need only consider these reports. In one of the medical reports dated 2 April 1994, it was said that the degree of scarring was so extensive that it was difficult to describe them in the report. I agree with that opinion and I must say that after looking at the plaintiff while he was in the witness box he is in fact an ugly man — as ugly as a duckling. He could not manage a smile and when he gave evidence he spoke softly and inaudibly. His voice was monotonous. I could hardly make out what the plaintiff wanted to say. I have to pay particular attention on several occasions before I could understand the plaintiff. The ugly scars that appeared on both hands and both legs were unsightly. The scars on both legs appeared to be scaly — more like a crocodile skin; no wonder the orthopaedic surgeon described the extensive scarring as 'unlikely to be amenable'.

Gani bte Empi, the plaintiff's wife (SP3 — 'Gani') gave evidence and she described that her husband was unconscious for 18 days upon admission to the specialist centre and she attended to him throughout until he was discharged. She elaborated that she had to feed her husband and attend to his toilet needs. After two years her husband slowly recovered and he was said to be able to hold a small spoon to feed himself. However, until the date of the hearing Gani said that she still had to attend to her husband, particularly buttoning his shirt and to feed him.

In *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* [1988] 1 MLJ 19, the first respondent, a dental surgery assistant, was injured when the door of an autoclave burst open throwing out surgical instruments and boiling water upon her resulting in her sustaining severe burns. She sustained 65% first and second degree burns involving parts of the face, trunk, both thighs and both upper limbs. She underwent surgery on two separate occasions where areas with skin loss were covered with split skin grafts. She subsequently developed keloids over the burn areas and was treated with compression garment.

The trial court awarded, inter alia, the first respondent:

(i) RM80,000 as general damages with interest at 8%; and

(ii) RM46,152 as cost of plastic surgery and RM10,500 as cost of psychiatric therapy at a private clinic.

The Supreme Court dismissed the appeal against the general damages in respect of the first respondent and upheld that award 'on the grounds that in the special circumstances of this case we should not disturb the award although it would appear to be a bit on the generous side.' In regard to the awards in respect of plastic surgery and psychiatric therapy, the Supreme Court disallowed such awards for two reasons. Firstly, the treatment was available in any government hospital and, secondly, they should be regarded as absorbed in the award for general damages.

By comparison, from the medical report reproduced in the early part of this judgment, the plaintiff here sustained extensive burns as a result of the electrical explosion on his face, both arms and hands and it went down to the lower limbs. RM80,000 to the plaintiff now is mere pittance bearing in mind the inflationary rate and the ever weakening ringgit in Johor Bahru. It is common knowledge that the cost of living in Johore Bahru is even higher than that of Kuala Lumpur. On this point, I need to refer to *Phuah Jee Suan v Nila Vasu Pillai* [1973] 1 MLJ 186 at p 188 (CA) where Choor Singh J had this to say:

> The other matter which requires consideration is the question of changes in the value of money which has been often termed as the decrease in the purchasing power of the dollar or the increase in the cost of living over the years. Leaving authority aside, both principle and common sense require that the court, when they assess an award of money, which is to compensate a plaintiff for the damage caused to him by his injuries, should take into account large and comparatively permanent changes in the real value, ie in the purchasing power of money. If one tries to assess an award of personal injuries today, and looks for guidance to an award made 20 years ago in a comparable case, the decline in the real value of money must be taken into account ... . It is therefore imperative that where an old comparable case is considered, there should be an adjustment for the change in the value of money which should be reflected in the award.

That was a case decided in Singapore in 1973. In 1975, that case was considered favourably in Malaysia by Yusoff J in *Wong Tin Vui v Patrick*

Midok & Anor [1975] 2 MLJ 260. In my judgment, a fall in the value of money must be taken into account when one attempts to obtain guidance from a comparable of yesteryear, so that the award which is eventually given is reflective of the current value of the money. This must be the correct approach to adopt. The defendant tortfeasor must also expect that an award would be reflective of the current value of money — this is a reasonable foreseeable deduction and would not be bad for remoteness (see *'The Wagon Mound'; Overseas Trading (UK) v Morts Dock and Engineering Co* [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126). In my judgment, the plaintiff must have suffered tremendously from the severe burns which rendered him unconscious for 18 solid days unlike the first respondent in *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* (supra). There was evidence adduced that the plaintiff walked out of the switch gear room after that loud explosion in a stupor with his whole body aflame. Rosli managed to douse that flame otherwise the plaintiff may have succumbed to his injuries just like Ridzuan. A fair and reasonable award for pain and suffering would, in the circumstances, be RM120,000.

Special damages

(a) Loss of earnings

Under this head, there was evidence that the plaintiff was in the pink of health before the accident and he doubled up as a driver and general worker to Ridzuan. The nature of the plaintiff's employment was supported by Rosli who unhesitantly described the plaintiff's job. The plaintiff testified that his income as a driver was RM700 per month and as a general worker, Ridzuan paid him an additional RM500 per month, thus making a grand total of RM1,200 per month. The plaintiff admitted, under cross-examination, that he did not declare his income to the Income Tax Department and this meant that he did not pay income tax for his income. There was also no KWSP's deductions nor contributions to SOCSO or PERKESO. No documents were produced to support the assertions of the plaintiff as to his salaries as a driver and a general worker. What was adduced was simply by way of oral testimony which I accept without hesitation. Gani, the faithful wife, supported the plaintiff's version. She testified that her husband gave her every month RM700 and with that money she 'uruskan bil-bil dan perbelanjaan rumah saya. Rumah itu saya sewa, sebulan RM200. Perbelanjaan saya sebulan makan dengan belanja rumah adalah RM300. Anak sekolah naik van dan makan dia RM100 lebih. Bil air dan bil api perlu dibayar. Masa itu suami saya — iaitu sebelum kejadian, suami saya bagi RM700 sebulan, tiap-tiap bulan.' Under cross-examination, Gani explained: 'sumbangan suami saya sebulan tetap RM700. Kalau tidak cukup saya minta daripada suami dan dia beri. Suami saya tidak ada kenderaan sendiri. Suami saya tidak ada hobi, tidak tengok wayang gambar di panggong wayang.' Until today, the plaintiff was still unemployed. On the strength of s 28A(2)(c)(iii) of the Civil Law Act 1956, it was argued

that there was a diminution of RM400 per month as the living expenses of the plaintiff. Unfortunately, there was no cross-examination of the plaintiff on this point. Gani, however, was emphatic that the plaintiff did not have a transport of his own and he did not go out to the theatre nor have a specific hobby. We even have evidence that on the date of the accident Ridzuan gave RM50 to the plaintiff to take his lunch with Rosli and Zakaria. With hardly any evidence of dimunition, I am constrained not to agree with the defendant's counsel. I am aware that s 28A(2)(c)(iii) of the Civil Law Act 1956 is intended to apply to a living plaintiff (*Chang Chong Foo & Anor v Shivanathan* [1992] 2 MLJ 473 (SC)). It is only logical that some part of the plaintiff's earnings must have been devoted to his own maintenance. But no matter how logical it may appear to be, it can only be deducted if the amount is either admitted by the plaintiff or proved by the defendant. Here, there is no admission by the plaintiff nor proved by the defendants and therefore no deduction would be made from the plaintiff's income (*Marappan v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99). I hold and it is my finding of fact that the plaintiff was earning RM1,200 per month before he met that unfortunate accident. At the time of accident, the plaintiff was 41 years of age using a direct multiplier of RM1,200 times 7½ (90 months), a figure of RM108,000 is arrived at and that would be the loss of earnings that should be awarded to the plaintiff, and I so award accordingly.

(b) Future medical expenses that would be incurred at the Medical Centre Johore

Under this head, I awarded RM50,000 which I considered reasonable and fair in the circumstances of the case. It may be argued that this amount may be absorbed in the award for general damages. But since this amount was pleaded under special damages, that argument does not apply here. There was evidence that the costs of the several reconstruction surgeries may amount to RM30,000 or more. It would not be incorrect to say that on the authority of *Zainuddin v Liew Pak Fun & Anor* [1962] MLJ 247, the plaintiff has not only pleaded the claim under this head but he has also proved it. An award to that effect was accordingly made.

(c) Cost of travelling to the hospital

This was disallowed as it was not specifically proved.

(d) Purchase of documents from the police at RM20 was allowed as it was proved by the presence of the police report in the agreed bundle.

(e) Nursing care

Gani gave evidence that she had to care for the plaintiff for a period of two solid years where after that time the plaintiff showed some form of resilience and independence. However, that independence was not full independence. Even at the date of the hearing, the plaintiff was unable

to button his shirt and needed the help of his wife. Gani still attended to the plaintiff even up to the date of the hearing. Gani was unemployed and was solely dependant on the plaintiff. In *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 (SC), a figure of RM350 per month was considered to be fair and adequate for the cost of caring Siti Rahmah at house. But Siti Rahmah was totally paralysed and needed nursing care all the time unlike the plaintiff here. However, it is undisputed that for two solid years the plaintiff was incapacitated — he had to rely entirely on his wife. There was evidence that Gani took care of the plaintiff's food and toilet needs. Thus, for pre-trial nursing care for a period of two years from 22 April 1992 to 21 April 1994 at RM300, I would award RM7,200 (RM300 per month x 2 years = RM7,200).

On future nursing care, it must not be forgotten that the wife may not be around all the time to feed and care for the plaintiff (*Croke (a minor) & Anor v Wiseman & Ors* [1982] 1 WLR 71; [1981] 3 All ER 852) and this must be the rationale for awarding an award under this head. On a conservative figure of RM100 for the duration of 5½ years (66 months), I would award the plaintiff RM6,600 under this head and I so award accordingly.

To recapitulate, on the basis of full liability, the plaintiff would be entitled to:

(1)	General damages (pain and suffering)	RM120,000.00
(2)	Special damages	
	(a) Loss of earnings	RM108,000.00
	(b) Future medical expenses that would be incurred at the Medical Centre Johore	RM50,000.00
	(c) Purchase of the document from the police	RM20.00
	(d) Nursing care	
	(i) Pre-trial nursing care	RM7,200.00
	(ii) Future nursing care	RM6,600.00
		RM291,820.00

For general damages, I award interest at the rate of 6% pa from date of filing of the suit to date of judgment. The special damages would attract interest at 4% pa from the date of accident until the date of judgment and thereafter the plaintiff would be entitled to 8% pa until realization. No interests would accrue for the future medical expenses that would be incurred at the Medical Centre Johore and for future nursing care.

Order accordingly.

Reported by PY Lo